

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DOUGLAS J. KEHRES, a single	)	
person, and JEANNETTE M. KEHRES,	)	No. 62952-2-I
a single person,	)	
	)	DIVISION ONE
Appellants,	)	
	)	
v.	)	
	)	
GREGORY L. URSICH and HEIDI J.	)	UNPUBLISHED OPINION
GASSMAN, individually and as	)	
attorneys for LINVILLE URSICH, PLLC,	)	FILED: March 8, 2010
a law firm doing business in the State	)	
of Washington,	)	
	)	
Respondents.	)	
	)	

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BECKER, J. – Douglas Kehres and Jeannette Kehres, proceeding pro se, appeal the summary judgment dismissal of their legal malpractice action against Gregory Ursich and Heidi Gassman,<sup>1</sup> attorneys with the firm Linville Ursich, PLLC. Finding no genuine issue as to any material fact, we affirm the trial court. Further, we find that the Kehres' appeal is frivolous and filed in violation of CR 11, and we grant Ursich's request for an award of attorney fees and costs pursuant to RAP 18.1 and 18.9 and CR 11.

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<sup>1</sup> We refer to Gregory Ursich and Heidi Gassman throughout this opinion collectively as "Ursich."

## FACTS

Ursich represented the Kehres between February 2, 2005, and April 27, 2005, in connection with a lawsuit brought by the purchasers under an agreement for the purchase and sale of the Kehres' real property. Prior to Ursich's representation of the Kehres, they were proceeding pro se. Also prior to Ursich's representation, the trial court granted the purchasers' motion for partial summary judgment and ordered the Kehres to specifically perform the purchase and sale agreement. The court also ordered the Kehres to take all actions necessary to complete the sale, including signing a boundary line adjustment.

Shortly after the court entered its order directing specific performance of the purchase and sale agreement, the Kehres, who were still proceeding pro se, filed a motion asking the court to set a specific closing date and to require the purchasers to pay a fee for an extension of the purchase and sale agreement. The trial court denied the Kehres' motion and included the following in its order on the motion: The Kehres are "further instructed to read and become familiar with CR 11 and the consequences that may flow from violations of CR 11."

A few months later, the purchasers filed a motion for an award of attorney fees and costs, based on the attorney fee provision in the purchase and sale agreement. The trial court granted the motion and awarded the purchasers over \$12,000 in attorney fees. Again, the court's order on the motion was entered

while the Kehres were acting pro se.

The Kehres retained Ursich on February 2, 2005. Ursich reviewed the court's order directing specific performance and other orders that had been entered in the litigation and concluded that the Kehres were bound by the court's orders. Ursich repeatedly advised the Kehres of the very real possibility that they would be held in contempt of the trial court's order directing specific performance if they continued to refuse to comply with it.

On April 15, 2005, the purchasers moved for an order directing the Kehres to show cause why they should not be held in contempt. While the purchasers' contempt motion was pending, the Kehres retained another attorney. Ursich's representation of the Kehres ended on April 27, 2005. Subsequently, the trial court entered an order of contempt, finding the Kehres in contempt of the court's order directing specific performance. The Kehres appealed, and in an unpublished opinion, we affirmed, finding that the trial court did not abuse its discretion by holding the Kehres in contempt of the specific performance order in light of their refusal to cooperate, sign the boundary line adjustment, and proceed toward closing. Cort v. Kehres, noted at 133 Wn. App. 1040 (2006).

The Kehres filed this action for legal malpractice against Ursich in April 2008. The trial court dismissed the action on Ursich's motion for summary judgment. Although the trial court declined to impose CR 11 sanctions, the court

stated that, particularly given the trial court's earlier warning to the Kehres about CR 11 sanctions, it gave serious consideration to imposing sanctions. The court stated that, in its opinion, any further litigation by the Kehres with respect to the underlying specific performance action or Ursich's representation of the Kehres should result in the imposition of CR 11 sanctions.

#### STANDARD OF REVIEW

We review summary judgment de novo and engage in the same inquiry as the trial court. Sherman v. Kissinger, 146 Wn. App. 855, 870, 195 P.3d 539 (2008). Summary judgment is appropriate if the pleadings, depositions, answers, and admissions, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c).

#### CONTINUANCE

The Kehres argue that the trial court erred by not continuing the summary judgment hearing pursuant to CR 56(f) in order to permit the Kehres to conduct further discovery. CR 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

A court may properly deny a continuance under CR 56(f) if: (1) the requesting party fails to offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party fails to state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact. Gross v. Sunding, 139 Wn. App. 54, 68, 161 P.3d 380 (2007).

The Kehres contend that they advised the trial court at a hearing on Ursich's motion to strike, apparently held the same day as the hearing on Ursich's motion for summary judgment, that a computer problem made it impossible for them to produce affidavits in opposition to the motion for summary judgment. They also claim the trial court should have continued the summary judgment hearing because Jeannette Kehres, who apparently argued at the hearing on the summary judgment motion, contracted strep throat, lost her voice, and was unable to complete her argument.

The parties' oral arguments at the hearing on the summary judgment motion were not transcribed, nor was any part of the hearing on the motion to strike. Thus, any statements the Kehres may have made to the trial court about computer problems or strep throat are not in the record before us. Further, there is no other evidence in the record showing that the Kehres asked the trial court for a CR 56(f) continuance, presented the requisite affidavits to the trial court, or apprised the trial court of what evidence would be established through the

additional discovery or that such evidence would raise a genuine issue of material fact. It appears, from the record before us, that the Kehres are raising the continuance issue for the first time on appeal. An argument not raised before the trial court cannot be raised for the first time on appeal. Sourakli v. Kyriakos, Inc., 144 Wn. App. 501, 509, 182 P.3d 985 (2008), review denied, 165 Wn.2d 1017 (2009).

Moreover, even assuming that the Kehres did ask the trial court for a continuance and the trial court denied their request, we will not disturb the trial court's decision. As appellants, the Kehres have the burden to provide an adequate record to review the issues they raise. Stevens County v. Loon Lake Prop. Owners Ass'n, 146 Wn. App. 124, 131, 187 P.3d 846 (2008). If, as here, they fail to meet this burden, the trial court's decision stands. Story v. Shelter Bay Co., 52 Wn. App. 334, 345, 760 P.2d 368 (1988).

#### RIGHT TO A JURY TRIAL

The Kehres contend that they were denied their constitutional right to a jury trial, under both the federal and state constitutions, by the trial court's summary judgment dismissal of their malpractice action. A party's constitutional right to a jury trial is not violated where there are no issues of fact to be determined by the jury. LaMon v. Butler, 112 Wn.2d 193, 198 n.5, 770 P.2d 1027, cert. denied, 493 U.S. 814 (1989). The dispositive issue, therefore, is

whether the Kehres demonstrated that issues of fact existed to be determined by the jury. We conclude that they did not.

The party opposing a motion for summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having affidavits considered at face value, but rather must set forth specific facts rebutting the moving party's contentions and disclose that a genuine issue of material fact exists. Strong v. Terrell, 147 Wn. App. 376, 195 P.3d 977 (2008), review denied, 165 Wn.2d 1051 (2009).

The elements of a malpractice cause of action are: (1) an attorney-client relationship giving rise to a duty of care by the attorney; (2) an act or omission by the attorney that is a breach of the duty of care; (3) damage to the client; and (4) proximate cause. Powell v. Associated Counsel for Accused, 146 Wn. App. 242, 247, 191 P.3d 896 (2008). Ursich argued on summary judgment that the Kehres failed to show an issue of fact as to the elements of breach of the standard of care and proximate cause. In order to withstand Ursich's motion for summary judgment, the Kehres had to set forth specific facts to rebut these contentions and to disclose that a genuine issue of material fact existed.

Specifically, to show that Ursich breached the standard of care, the Kehres had to show that Ursich failed to exercise "the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law" in this state. Hizey v.

Carpenter, 119 Wn.2d 251, 261, 830 P.2d 646 (1992). In determining whether an attorney breached this duty of care in a legal malpractice action, expert testimony is often required because the law is a highly technical field beyond the knowledge of the ordinary person. Geer v. Tonnon, 137 Wn. App. 838, 850, 155 P.3d 163 (2007), review denied, 162 Wn.2d 1018 (2008). The Kehres offered no expert testimony to establish the standard of care and to establish that Ursich's performance fell below that standard. Indeed, we find no evidence in the record—from either expert or lay witnesses—to show that a genuine issue of material fact existed as to the standard of care and as to Ursich's breach of the standard of care. The Kehres failed to meet their burden of proof on these core elements of a legal malpractice cause of action.

The Kehres likewise failed to meet their burden on the proximate cause element of a malpractice cause of action. Specifically, the Kehres had the burden to show that Ursich's negligence was the proximate cause of their injury. Smith v. Preston Gates Ellis, LLP, 135 Wn. App. 859, 864, 147 P.3d 600 (2006), review denied, 161 Wn.2d 1011 (2007). Proximate cause is determined by the "but for" test, and the plaintiff must demonstrate that "but for" the attorney's negligence, he or she would have obtained a better result. Smith, 135 Wn. App. at 864. Again, we find no evidence in the record to show that any negligence by Ursich proximately caused any damage to the Kehres. The trial court's order directing specific performance of the purchase and sale agreement was entered



prior to the commencement of Ursich's representation of the Kehres, and the time for appealing that order had expired before the commencement of Ursich's representation. The Kehres do not show that they would not have been held in contempt but for any negligence by Ursich and we doubt they could have made such a showing. The contempt order was entered upon the Kehres' refusal to comply with the trial court's order directing specific performance. Ursich repeatedly warned the Kehres of the strong possibility that their continued refusal to comply with the order would result in their being held in contempt of court. In sum, we find that the Kehres failed to meet their burden to show the existence of a genuine issue of material fact on the proximate cause element of a malpractice cause of action.

Because the Kehres failed to meet their burden to set forth specific facts and to disclose that a genuine issue of material fact existed as to breach of the standard of care and proximate cause, the trial court properly entered summary judgment in Ursich's favor and dismissed the Kehres' malpractice action. Further, because no issue of fact existed for determination by a jury, the Kehres were not deprived of their constitutional right to a jury trial by the summary judgment dismissal of their malpractice action.

#### CAUSE OF ACTION FOR VIOLATION OF RULES OF PROFESSIONAL CONDUCT

The Kehres asserted a cause of action for "unethical conduct" against

Ursich, apparently based on Ursich's alleged violation of the Rules of Professional Conduct (RPCs). The trial court correctly dismissed this cause of action on summary judgment because, regardless of whether Ursich did or did not violate an RPC, a breach of an ethics rules does not provide a private remedy. Hizey, 119 Wn.2d at 259.

## SANCTIONS

Ursich requests an award of attorney fees and costs on the ground that the Kehres' appeal is frivolous. We agree that an award of sanctions is appropriate.

Under RAP 18.9(a), an appellate court may impose sanctions for a frivolous appeal. An appeal is frivolous if it presents no debatable issues upon which reasonable minds might differ and is so totally without merit that there is no reasonable possibility of a reversal. State ex rel. Quick-Ruben v. Verharen, 136 Wn.2d 888, 905, 969 P.2d 64 (1998). In addition, CR 11 discourages filings that are not "well grounded in fact" and "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law," or are interposed for an improper purpose, "such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." CR 11(a)(1)-(3). CR 11 permits a court to award sanctions, including expenses and attorney fees, where a litigant acts in bad faith in instituting or conducting litigation. Delany v. Canning, 84 Wn. App. 498, 509, 929 P.2d 475, review denied, 131 Wn.2d 1026 (1997). We conclude that the Kehres' appeal is both frivolous under RAP 18.9 and in violation of CR 11. The Kehres have advanced no meritorious arguments as to why the trial court erred in granting Ursich's motion for summary judgment. As below, the Kehres fail to support their allegations of malpractice with credible evidence. The Kehres were previously

advised of CR 11 and the consequences of its violation and were warned that CR 11 sanctions would be appropriate should they continue to advance their meritless arguments. An award of sanctions is appropriate under both RAP 18.9 and CR 11.

We affirm the trial court's order granting summary judgment in favor of Ursich and award Ursich its reasonable attorney fees on appeal. Ursich is directed to comply with RAP 18.1.

Becker, J.

WE CONCUR:

Leach, J.

Grosse, J.